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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

JOHN MOORE,

Petitioner,

v.

REGENTS OF THE UNIVERSITY OF CALIFORNIA, DAVID W. GOLDE, M.D., SHIRLEY G. QUAN,

Respondents.

Petition for Writ of Certiorari to the Supreme Court of California

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PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Just Compensation Clause of the Fifth Amendment, as applied to the States through the Fourteenth Amendment, requires a State to provide just compensation for the nonconsensual taking of economically valuable human bodily substances from a person, when those substances are subsequently exploited by the State for commercial gain.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
JURISDICTION	2
CONSTITUTIONAL PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	2
REASONS FOR GRANTING THE WRIT	12
CONCLUSION	22

TABLE OF AUTHORITIES

Cases	Page
Board of Regents v. Roth, 408 U.S. 564 (1972)	19
Board of Regents of the University of California v. Bakke, 438 U.S. 265 (1978)	12
Chambers v. Mississippi, 410 U.S. 284 (1973)	14
Chicago B. & O. R. Co. v. City of Chicago, 166 U.S. 226 (1897)	12
Cobbs v. Grant, 8 Cal.3d 229 (1972)	18
Dames & Moore v. Regan, 453 U.S. 654 (1981)	18
Demorest v. City Bank Farmers Trust Co., 321 U.S. 36 (1944)	20
Duke Power Co. v. Carolina Environmental Study Group, 438 U.S. 59 (1978)	18
Hodel v. Surface Mining & Reclamation Ass'n, 452 U.S. 264 (1981)	18
Hudson v. Palmer, 468 U.S. 517 (1984)	13
Kaiser Aetna v. United States, 444 U.S. 164 (1979)	17
Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1981)	17, 18
Lugosi v. Universal Pictures, 25 Cal.3d 813 (1979)	19
Penn Central Transportation Co. v. City of New York, 438 U.S. 104 (1978)	17
Ruckleshaus v. Monsanto Co., 467 U.S. 986 (1984)	18, 20
Schloendorff v. Society of New York Hospital, 211 N.Y. 1225, 105 N.E. 92 (1914)	18
United States v. General Motors Corp., 323 U.S. 373 (1945)	18
United States v. Peewee Coal Co., 341 U.S. 114 (1951)	17
Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155 (1980)	20, 21
Williamson County Regional Planning Comm'n v. Hamilton Bank, 473 U.S. 172 (1985)	13
Yuba River Power Co. v. Nevada Irr. Dist., 207 Cal. 521 (1929)	8, 19

TABLE OF AUTHORITIES—Continued

Statutes Page

28 U.S.C. § 1257 2
California Health & Safety Code § 7054 ..... *passim*
California Health & Safety Code § 7150 15

Other Authorities

Dolnick, Spare Parts, 195 The New Republic 16 (1986) 19
Medicine and Profits, U.S. News and World Report, Aug. 17, 1981, at 54 19
Thompson, Genetic Breakthroughs, 1 Editorial Res. Rep. 4 (1986) 19
Thompson, Judicial Takings, 76 Va. L. Rev. 1449 (1990) 21
Tompkins, Capitalizing in Life, Sci. Dig., June 1986, at 33 19
L. Tribe, American Constitutional Law 608 (2d ed. 1988) 21
U.S. Congress, Office of Technology Assessment, New Developments in Biotechnology: Ownership of Human Tissues and Cells 27 (1987) 19
N.Y. Times, Mar. 9, 1987, § 1 at 1, Col. 6 19

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PETITION FOR WRIT OF CERTIORARI

Petitioner John Moore respectfully prays that a writ of certiorari issue to review the orders and judgments of the Supreme Court of California entered on July 9, 1990 and August 30, 1990.[1]

OPINIONS BELOW

The July 30, 1990 opinion and judgment of the California Supreme Court is reported at 51 Cal.3d 120, 271 Cal. Rptr. 146, 793 P.2d 479, and is reprinted in the Appendix to this petition ("Pet. App.") at 1a. The August 30, 1990 order of the California Supreme Court denying the petition for rehearing is unreported, and is

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[1] The parties to the proceedings below were: petitioner; the Regents of the University of California; David W. Golde, M.D.; Shirley G. Quan; Genetics Institute, Inc.; Sandoz, Ltd.; Sandoz United States, Inc.; and Sandoz Pharmaceuticals Corporation.

reprinted in the Appendix to this petition at 95a. The decision of the California Court of Appeal is reported at 215 Cal.App.3d 709, 249 Cal. Rptr. 494 (1988).

JURISDICTION

The California Supreme Court entered an order denying petitioner's petition for rehearing on August 30, 1990. On November 16, 1990, this Court extended the time for filing the instant petition to and including December 28, 1990. Jurisdiction is conferred on this Court by 28 U.S.C. § 1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the Constitution of the United States, which provides, in relevant part:

> Nor shall private property be taken for public use, without just compensation.

The Fourteenth Amendment to the Constitution of the United States, Section 1, which provides, in relevant part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person the equal protection of the laws.

STATEMENT OF THE CASE

In 1976, John Moore was diagnosed as having a condition known as "hairy-cell leukemia."[2] He sought medical treatment at the Medical Center of the University of California, Los Angeles (UCLA Medical Center)

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[2] The California Supreme Court decided this case on a motion for demurrer. *Moore v. Regents of the University of California*, 51 Cal.3d 120, 125 (1990); Pet. App. 1a. All properly pleaded allegations in the complaint were thus accepted as true for purposes of the motion. 51 Cal. 3d at 126; Pet. App. 2a. The facts set forth in this Statement are drawn from the Complaint, which is reprinted at Pet. App. 101a.

—a state university—and was seen by Dr. David W. Golde, a physician employed by UCLA. Dr. Golde confirmed Moore's diagnosis. During Moore's subsequent hospitalization, extensive amounts of blood, bone marrow aspirate, and other bodily substances were extracted from him. Thereafter, Moore was readmitted to the UCLA Medical Center and underwent a splenectomy, recommended by Dr. Golde and others, but not performed by Dr. Golde. Moore consented to the removal of his spleen based on Dr. Golde's representation that it was a necessary part of the treatment for his disease.

Prior to the operation, without Moore's knowledge, Dr. Golde and Shirley G. Quan, a researcher employed at UCLA, had determined that Moore's cells were unique, and extremely valuable. As stated in Moore's complaint, he "possesses a unique type of blood and blood components with cells possessing unique properties, unique genetic materials, and producing unique products which in and of themselves, and when isolated, cloned or cultured through biomedical, biokenetic, and other means, have the potential for providing, and have provided, significant breakthroughs on the research and development concerning blood cancers, blood disorders, virally-related diseases, diseases of the immune system, and other conditions or disorders." Complaint ¶ 1; Pet. App. 101a-102a. *See also id.* at ¶¶ 8-12; Pet. App. 104a-105a. As a result, respondents Golde and Quan decided to obtain samples of Moore's bodily materials for research and commercial purposes. They did not, however, apprise Moore of their intent. Instead, they represented that the samples were needed for therapeutic purposes. Complaint ¶¶ 9-25; Pet. App. 104a-108a.

After the operation, without Moore's knowledge or consent, Golde and Quan obtained a portion of Moore's spleen. They utilized the spleen and samples of Moore's blood and bodily substances to grow a cell-line, composed of his cells, that is capable of producing pharmaceutical

products of enormous therapeutic and commercial value. Golde and Quan subsequently patented the cell-line—derived exclusively from Moore's tissues and composed of his cells—as well as nine products derived therefrom. They assigned the patent to the Regents of the University of California (the governmental entity that owns and operates UCLA Medical Center). Without informing Moore or obtaining his consent, and in pursuit of their research efforts and commercial ventures, Golde and UCLA Medical Center continued to monitor him and take tissue and blood samples from him every six months for almost seven years following the removal of his spleen.[3] This required Moore to travel repeatedly to Los Angeles from his home in Seattle, Washington. On each occasion, Moore made the trip based on representations that the procedures could be performed only at UCLA Medical Center under Golde's direction. Complaint ¶ 30; Pet. App. 110a.

Upon recognizing the enormous economic potential of Moore's bodily materials, Dr. Golde and Ms. Quan laid the groundwork for exploiting the economic value of the materials. In particular, they entered into contracts with Genetics Institute, Inc. and Sandoz Pharmaceuticals, which guaranteed payment of more than $400,000 over a four-year period. Dr. Golde also obtained substantial stock holdings in Genetics Institute. In return, Genetics

[3] In his complaint, Moore alleged that he did not give informed consent to the initial spleen operation because he was not informed of the intended research and commercial uses of Dr. Golde. He further alleged that the first time he gave any form of consent to the research use of his bodily materials was 7 years later—after numerous extractions of bodily material—but that the consent was not informed because Dr. Golde did not reveal the commercial potential of the materials. Moore further alleged that he refused to give consent to such use when requested to do so six months after initially consenting to the use of his bodily materials. In spite of this express lack of consent, Golde, Quan, and UCLA Medical Center continued their commercial exploitation of his cell-line.

Institute and Sandoz Pharmaceuticals gained exclusive access to Moore's bodily materials and the cell lines grown from them, and thus had the exclusive right to exploit the commercial potential of these materials.[4] No one made any effort to inform Moore of the value of his bodily materials, or to obtain his consent to the commercial exploitation of the materials that would subsequently be extracted from him.

In 1984, Moore instituted a lawsuit based on these events. His third amended complaint names Golde, Quan, the Regents, Sandoz, and Genetics Institute, as defendants, alleging causes of action for: (1) conversion; (2) lack of informed consent; (3) breach of fiduciary duty; (4) fraud and deceit; (5) unjust enrichment; (6) quasi-contract; (7) breach of implied covenant of good faith and fair dealing; (8) intentional infliction of emotional distress; (9) negligent misrepresentation; (10) interference with prospective advantageous economic relationships; (11) slander of title; (12) accounting; and (13) declaratory relief. Plaintiff alleged damages, including lost profits, and punitive damages. *See* Complaint; Pet. App. 101a.

With regard to his cause of action for conversion, plaintiff alleged that his "blood and bodily substances" (all bodily tissues, including cells, spleen, blood and genetic material) have significant commercial value because they possess unique properties with a potential for breakthroughs in medical research and the treatment of disease. He further alleged that defendants knew of this value and were aware that having access to Moore would enable them to locate, isolate and cultivate large quantities of these valuable substances, and thus would provide defendants with competitive, commercial, and scien-

[4] Complaint ¶¶ 41(p)-41(r); Pet. App. 119a. The market potential of products from Moore's cell-line was predicted to be hundreds of millions of dollars by the 1990s. Hundreds of thousands of dollars have already been paid under these agreements to the developers.

tific advantages. In light of this knowledge, plaintiff alleged, defendants formed the intent to exploit the scientific and commercial value of plaintiff's tissues prior to the splenectomy. The subsequent course of his treatment was designed to and did further defendants' research and commercial activities, unrelated to plaintiff's treatment.[5] *Id.* ¶¶ 9-63; Pet. App. 102a-122a.

Plaintiff alleged that he never knew of nor was he informed of defendants' scientific and commercial exploitation of his bodily substances. Indeed, defendants misrepresented the nature of the research to plaintiff by advising him that there was no commercial or financial value to his tissues. Plaintiff alleged that had he known what was taking place, he would not have consented to the splenectomy or later extractions for defendants' research and commercial activities; would have insisted on participating in control of his blood and bodily substances; would not have permitted these materials to be used by defendants solely for their independent research, commercial activity, and economic benefit; would have considered treatment at another medical facility where his wishes would have been carried out; and would have sought participation in the economic benefit.

Plaintiff's conversion complaint is summarized succinctly in the following allegation:

> "Plaintiff alleges that his Blood and Bodily Substances, including but not limited to his blood, blood components, by-products, bodily tissues, lymphokines, genetic material, genetic sequences, conditioned medium, spleen, sperm, bone marrow aspirate, and other substances derived from his Blood and Bodily Sub-

[5] Plaintiff alleged that while under the care of Golde and UCLA Medical Center, they engaged in a number of activities aimed at commercial exploitation of the cell-line derived exclusively from his bodily substances and composed of his cells, including entering into the agreements with Sandoz and Genetics Institute, and obtaining the various patents. None of this activity was disclosed to plaintiff.

> stances, are his tangible property, and the activities of the defendants as set forth herein constitute a substantial interference with plaintiff's possession or right thereto, as well as defendants' wrongful exercise of dominion over plaintiff's personal property rights in his Blood and Bodily Substances."

Complaint ¶ 60; Pet. App. 128a.

The California Superior Court sustained defendants' demurrers to plaintiffs' complaint. The court first addressed the demurrer jointly filed by the Regents, Golde and Quan, concluding that plaintiff's cause of action for conversion was defective for failure to make specific allegations that the defendants acted with a pre-formed wrongful intent, and because the complaint did not attach the consent forms at issue.[6] The court later dismissed the complaint as to these three defendants. Some months later, another judge sustained the demurrers of Genetics and Sandoz, concluding that there was no recognized cause of action for plaintiff's claim and declining to create one. Neither ruling was based on the conclusion that Moore lacked any property rights in his bodily materials.

The Court of Appeal for the Second Appellate District concluded that the demurrers were improperly sustained because: "the plaintiff has adequately stated a cause of action for conversion." *Moore v. Regents of the University of California*, 215 Cal.App.3d 709, 249 Cal. Rptr. 494 (1988). Citing recent California case law, the Court of Appeal observed:

> "[f]or conversion, a plaintiff need only allege: '(1) plaintiffs' ownership or right to possession of the property at the time of the conversion; (2) defendants' conversion by a wrongful act or disposition of plaintiffs' property rights; and (3) damages."

Slip op. at 17. The Court of Appeal observed that, in California, "[p]roperty is '"every species of right and

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[6] The trial court concluded that plaintiff's conversion action was incorporated into his remaining causes of action, which were therefore defective for the same reasons.

interest capable of being enjoyed as such upon which it is practicable to place a money value.'" *Id.* at 23 (quoting *Yuba River Power Co. v. Nevada Irr. Dist.*, 207 Cal. 521, 523 (1929)), and that "'ownership . . . is the right . . . to possess and use [a thing] to the exclusion of others,'" *id.* at 22 (quoting Cal. Civ. Code § 654).

The Court of Appeal then rejected defendants' "position that plaintiff cannot own his tissue, but that they can."

> "Apparently, defendants see nothing abnormal in their exclusive control of plaintiff's excised spleen, nor in their patenting a living organism derived therefrom. We cannot reconcile defendant's assertion of what appears to be their property interest in removed tissue and the resulting cell-line with their contention that the source of the material has no rights therein."

Id. at 29. Without plaintiff's cells, taken without his consent, "there could have been no . . . cell-line." *Id.* at 30.

The Court of Appeal also rejected the Regents' argument that plaintiff should be denied compensation for his cells because "*unencumbered* access to human tissue for research is essential to progress and public health." *Id.* at 33 (emphasis in original). The Court observed that the State had itself chosen a market approach to research in human cells and tissue—otherwise defendants could not have exploited plaintiff's tissue for their own enormous profit. "If this science has become science for profit, then we fail to see any justification for excluding the patient from participation in those profits." *Id.* at 35. The Court also noted the extraordinary invasion of human dignity that would be invited by the "unencumbered" right of governmental access to human tissue advocated by the Regents. *Id.* at 33.

A deeply divided California Supreme Court reversed the Court of Appeal's ruling with respect to plaintiff's

conversion claim.[7] The majority did not deny that plaintiff, and all persons in California, "own" their own tissues and cells while those tissues and cells form a part of their bodies.[8] The Court assumed for purposes of decision that defendants had taken plaintiff's tissues from him without valid consent. Yet the majority framed the issue as whether plaintiff "*retained* an ownership interest" in his tissues *after* the state actors had taken them. 51 Cal. 3d at 136-37; Pet. App. 19a (emphasis added). Having so framed the issue, the majority held that under California law, by excising plaintiff's property (albeit without his consent), the State had extinguished all plaintiff's rights to ownership of that property and transferred them to itself. Consequently, no claim would lie for conversion, through which the plaintiff might obtain compensation for the loss of biological materials that had been his property before being wrongfully excised.

The state supreme court majority advanced three explanations for this ruling. First, it could find no prior

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[7] The Court unanimously held that plaintiff's complaint stated a cause of action for breach of the physician's disclosure obligations. As discussed *infra*, such an action plainly protects a different interest than a conversion action, proceeding solely from a fiduciary obligation to obtain informed consent to a medical procedure, and not from the notion that a persons property has been converted without consent.

[8] The dissent observed without rejoinder that "under California law . . . before a body part is removed it is the patient, rather than his doctor or hospital, who possesses the right to determine the use to which the body part will be put after removal. 51 Cal. 3d at 151 (Broussard, J.); Pet. App. 42a. The majority effectively concedes this crucial point, characterizing the question for decision as whether plaintiff "*continued* to own his cells following their removal," *id.* at 134 (emphasis added); Pet. App. 16a; whether plaintiff "retained an ownership interest in them," *id.* at 136-37; Pet. App. 19a; and whether "a person retains a sufficient interest in excised cells to support a cause of action for conversion," *id.* at 137; Pet. App. 19a.

decision allowing an action for conversion of excised human tissue, although it cited no judicial decision denying such an action. *Id.* at 136-40; Pet. App. 18a-28a. Second, it maintained that California Health and Safety Code section 7054.4 "eliminates so many of the rights ordinarily attached to property that one cannot simply assume that what is left amounts to 'property' or 'ownership' for purposes of conversion law." *Id.* at 141; Pet. App. 24a.[9] Third, the majority claimed that plaintiff's wrongfully seized cells and tissues "cannot be [his] property," because those tissues have now become "the subject matter of the Regents' patent." *Id.* at 141; Pet. App. 26a.[10]

In light of its ruling that plaintiff had not been deprived of a property interest by defendants' actions, the

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[9] That section provides:

> "Notwithstanding any other provision of law, recognizable anatomical parts, human tissues, anatomical human remains, or infectious waste following conclusion of scientific use shall be disposed of by interment, incineration, or any other method determined by the state department [of health services] to protect the public health and safety."

The majority did not explain how a state that requires safe disposition of materials *after* scientific use extinguishes rights to determine whether and how human tissue is used for scientific purposes. Nor did the majority explain why defendants may own defendants' tissue after they have taken it from him, if this statute extinguishes all rights of property in excised tissue. Indeed, under the majority's view, it appears, ironically, that only the *source* of the tissue is deprived of ownership rights.

[10] Because this case was decided on demurrer, the California Supreme Court's conclusion that petitioner's bodily materials lacked the attributes of property was not based on any evidentiary foundation. The court did purport to take judicial notice of scientific material supporting its view, but did so in violation of California law and basic notions of fairness. Petitioner was never afforded an opportunity to submit to the court his own views on the persuasiveness of the materials on which the court relied. Indeed, one of the articles on which the court relied was written by Respondent Golde, hardly an impartial source.

majority of the state supreme court did not reach Sandoz's contention that the Regents had taken plaintiff's rights "pursuant to their power of eminent domain." *Id.* at 147, n.44; Pet. App. 36a. Presumably for similar reasons, the Court did not address plaintiff's contention, advanced in his brief in the California Supreme Court, *see* Pet. App. 95a, that to fail to recognize a conversion action would effect a taking of plaintiff's property without just compensation in violation of the Fifth and Fourteenth Amendments to the U.S. Constitution.

Justices Broussard and Mosk issued separate, strenuous dissents. Justice Broussard emphasized that the majority opinion asked the wrong question:

> The majority opinion fails to recognize . . . that, in light of the allegations of the present complaint, the pertinent inquiry is not whether a patient generally retains an ownership interest in a body part after its removal from his body, but rather whether a patient has a right to determine, before a body part is removed, the use to which the part will be put after removal.

51 Cal.3d at 154; Pet. App. 46a. He rejected each of the majority's explanations for its ruling,[11] and concluded that under traditional California common law principles, defendants' fraudulent extraction, for commercial exploitation, of substances still plaintiff's property because still part of his body at the time they were taken, should give rise to an action for conversion.

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[11] Justice Broussard observed that: 1) although no decisions expressly support a conversion action in these circumstances, similarly, no decisions previously had denied the existence of such an action; 2) California Health and Safety Code section 7054.4 on its face does *not* deprive a patient of the right to choose among legally permissible uses of his body parts after their removal but prior to conclusion of scientific research on those parts; and 3) defendants' patent cannot deny plaintiff compensation for the value of raw materials mined without consent out of his body for commercial exploitation by defendants. 51 Cal. 3d at 156-57; Pet. App. 53a.

Justice Broussard concluded by observing that the effect of the majority's decision does not "elevat[e] these biological materials above the marketplace." To the contrary:

> the majority's holding simply bars *plaintiff*, the source of the cells, from obtaining the benefit of the cells' value, but permits *defendants*, who allegedly obtained the cells from plaintiff by improper means, to retain and exploit the full economic value of their ill-gotten gains free of their ordinary common law liability for conversion.

Id. at 160; Pet. App. 56a.[12]

In his petition for rehearing, Moore reiterated his claim that dismissal of his conversion action would constitute a taking of his property without just compensation in violation of the Fifth and Fourteenth Amendments to the U.S. Constitution. *See* Pet. App. 98a-100a. On August 30, 1990, the California Supreme Court denied plaintiff's petition for rehearing. On November 16, 1990, this Court extended the time for the filing of this petition to and including December 28, 1990.

REASONS FOR GRANTING THE WRIT

This case presents an important issue of constitutional law that has not been, but should be, settled by this Court: whether the Just Compensation Clause of the Fifth Amendment,[13] requires a State to provide just com-

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[12] Justice Mosk reached a similar conclusion, rejecting each of the majority's purported rationales.

[13] The Just Compensation Clause of the Fifth Amendment applies to the States through the Fourteenth Amendment. *Chicago B. & Q. R. Co. v. City of Chicago*, 166 U.S. 226, 239 (1897).

The conduct of respondents constituted state action for Fifth and Fourteenth Amendment purposes. The Regents of the University of California are a state entity, *cf. Board of Regents of the University of California v. Bakke*, 438 U.S. 265 (1978), and respondents Golde and Quan were employees of the University, and

pensation for the nonconsensual taking of economically valuable human bodily substances, when those substances are subsequently exploited by the State for commercial gain.[14]

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were acting within the scope of their duties as employees, when they committed the actions at issue in this case.

[14] Despite the California Supreme Court's failure to address the constitutional issue, petitioner's asserted Fifth Amendment violation is properly before the Court.

In *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172 (1985), this Court held a takings claim under the Fifth Amendment is not "ripe" until just compensation has been denied by the State. Thus, the Court explained that "the State's action is not 'complete' in the sense of causing a constitutional injury 'unless or until the State fails to provide an adequate postdeprivation remedy for the property loss.'" *Id.* at 195, quoting *Hudson v. Palmer*, 468 U.S. 517, 532 n.12 (1984). *Accord id.* ("[T]he State's action . . . is not 'complete' until the State fails to provide adequate compensation for the taking."). Indeed, as the Court expressly stated, "a property owner has not suffered a violation of the [Just Compensation] Clause until the owner has unsuccessfully attempted to obtain just compensation through the procedures provided by the State for obtaining such compensation." *Id.*

Petitioner sought postdeprivation compensation through a conversion action under California common law. It was not until the State denied him this remedy—through a ruling that petitioner retained no property interest in his bodily materials extracted without informed consent—that petitioner's constitutional claim arose. *See id.* at 194 n.13 ("[N]o constitutional violation occurs until just compensation has been denied."). And the State did not deny petitioner compensation through his conversion claim until the California Supreme Court ruled, for only then was it clear that a state procedure for compensation was "unavailable." *Id.* at 197. The California Supreme Court is the final arbiter of California law, and had not previously spoken on this issue. Indeed, the lower courts adjudicating petitioner's claim did not even intimate that petitioner might lack a property interest in his bodily materials.

Thus, by asserting the Fifth Amendment issue in his brief before the Supreme Court and again in his petition for rehearing, petitioner raised his constitutional claim at the earliest appropriate

1. The California Supreme Court divided sharply over whether petitioner Moore possessed a property interest entitling him to compensation. Every member of the court agreed that petitioner possessed a property interest in his bodily substances prior to their extraction. *See* 51 Cal.3d at 136-37; Pet. App. 19a; *id.* at 151; Pet. App. 42a. The majority of the court also acknowledged that under some circumstances, "the right to control the use of excised cells does survive" removal from a person's body. 51 Cal.3d at 141; Pet. App. 25a. The court nonetheless rejected petitioner's suit for compensation. This result was not based on any finding that petitioner abandoned his interest in the excised bodily materials; such a finding was foreclosed by petitioner's properly pled allegations that the materials were removed without obtaining his informed consent. Instead, the court held as a matter of law that petitioner "retained" no "ownership interest" in his bodily materials after they had been taken without consent for scientific use and commercial exploitation by the State. *Id.* at 136-37; Pet. App. 19a.

As the dissenting Justices of the California Supreme Court demonstrated, the majority's conclusion lacked any substantial basis in either logic or law. To the contrary, the court's entire analysis rested on two obvious *non sequiturs*. The court's assertion that "California statutory law drastically limits any continuing interest of a patient in excised cells," 51 Cal.3d at 137; Pet. App. 19a, was supported by reference to state laws governing

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occasion. *See* Pet. App. 95a (brief), 98a (petition for rehearing). Indeed, petitioner raised the claim *before* it had actually ripened, since the Supreme Court had not yet ruled. *See Williamson County*, 473 U.S. at 197 (holding that until a property owner has utilized the State procedure and been denied compensation, his "taking claim is premature"). As in *Chambers v. Mississippi*, 410 U.S. 284, 290-291 n.3 (1973), "petitioner's constitutional claim . . . could not have been raised and ruled upon" prior to the California Supreme Court's decision. Thus, as in *Chambers*, this Court may properly exercise jurisdiction in this case. *See id.*

the disposal of human bodily materials "*following conclusion of scientific use*" of those materials, or upon death. *E.g.*, Health & Safety Code § 7054.4 (emphasis added); *id.* § 7054.3; Government Code § 27401.46. 51 Cal.3d at 140-41; Pet. App. 24a.[15] The issue here, of course, is whether petitioner is entitled to compensation for the taking of his bodily materials *for* scientific and commercial use, not whether petitioner retains an unrestricted right to dominion and control *after* the State has finished exploiting the commercial potential of the material.

The provisions on which the court relied do no more than direct that bodily materials be disposed of in ways consistent with public health and safety. As the court conceded, these provisions do not express a legislative intention "to resolve the question of whether a patient is entitled to compensation for the nonconsensual use of excised cells." 51 Cal.3d at 140; Pet. App. 24a-25a. Other California statutory provisions, in contrast, do explicitly recognize that individuals possess rights to control the disposition of excised bodily materials. In particular, the State's Uniform Anatomical Gift Act invests individuals with the right to control disposition of organs removed for transplantation.[16]

Furthermore, as one dissenting Justice on the California court recognized,

> [i]f . . . another medical center or drug company had stolen all of the cells in question from the UCLA Medical Center laboratory and had used them for its own benefit, there would be no question but that a cause of action for conversion would properly lie

[15] The court admitted that "[c]learly the Legislature did not specifically intend this statute to resolve the question of whether a patient is entitled to compensation for the nonconsensual use of excised cells." 51 Cal. 3d at 140; Pet. App. 24a-25a. As the court noted, a "primary object of the statute is to ensure the safe handling of potentially hazardous biological waste materials." *Id.*

[16] Health and Safety Code §§ 7150 *et seq.*

> against the thief, and the majority opinion does not suggest otherwise. Thus, the majority's analysis cannot rest on the broad proposition that a removed body part is not property, but rather rests on the proposition that a *patient* retains no ownership interest in a body part once the body part has been removed from his or her body.

51 Cal.3d at 153-54; Pet. App. 46a (Broussard, J., dissenting in part) (emphasis in original). Yet the court could point to nothing in existing California law that supported extinguishing petitioner's economic interest while preserving the right of the State "to retain and exploit the full value of their illgotten gains free of their ordinary common law liability for conversion." *Id.* at 160; Pet. App. 56a.

Nor is there any legal basis for the court's holding that petitioner retained no property interest because "the patented cell line" made from his bodily materials "is both factually and legally distinct from the cells taken from Moore's body." 51 Cal.3d at 141; Pet. App. 26a. Even if the court were correct that the mere existence of a patent precludes petitioner from asserting ownership of the patented product itself, patent law provides no factual or legal basis for precluding petitioner from recovering damages for conversion of the raw materials that went into the making of the patented product.[17] At most, the existence of the patent might conceivably limit the extent of damages to which petitioner would be entitled.

2. The ruling of the California Supreme Court raises important, unresolved issues under the Just Compensation

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[17] The court's analysis effectively transforms a patent into a safe-harbor for theft in California. Such a result is untenable, however. It is inconceivable that the converter of naturally occurring raw materials, such as minerals or chemical compounds, could defeat a conversion claim by showing that the materials were used in the production of a product for which a patent was subsequently obtained.

Clause of the Fifth Amendment. If petitioner's bodily materials are cognizable as property within the meaning of that constitutional provision, this Court's prior decisions leave little doubt that the State's actions would constitute a taking for which compensation would be required. The State of California exercised permanent, exclusive physical dominion over the bodily materials extracted from petitioner without his informed consent. In so doing, the State deprived petitioner of the "essential sticks in the bundle of rights that are commonly characterized as property." *Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979). Petitioner lost the "right to possess," the "right to control use," and the right to exclude others from using his bodily materials. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435-36 (1982); *see also Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 124 (1978) ("A 'taking' may more readily be found when the interference with property can be characterized as a physical invasion by government"); *United States v. Peewee Coal Co.*, 341 U.S. 114, 116 (1951) ("actual taking of possession and control" constitutes taking).[18] Indeed, the State's action in this case is particularly suspect, because respondents Golde and Quan were acting not to advance a purely public purpose, but to further an enterprise that would generate substantial profits for them personally and for the State.

Because the court's denial of legal redress rests on the conclusion that petitioner "retained" no property interest

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[18] In its "permanence and absolute exclusivity," *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435 n.12 (1982), the State's exercise of dominion over petitioner's bodily material is indistinguishable from government's physical occupation of property. This Court has

> long considered a physical intrusion by government to be a property restriction of an unusually serious character for purposes of the Takings Clause. Our cases further establish that when the physical intrusion reaches the extreme form of a permanent physical occupation, a taking has occurred.

Id. at 426.

in bodily materials extracted without informed consent, this case squarely raises the issue whether petitioner possessed a Fifth Amendment property interest in controlling the use to which those materials would be put.[19] If petitioner has a property interest in his bodily materials, the State's nonconsensual taking of that interest without just compensation constitutes a violation of the Just Compensation Clause. *See, e.g., Hodel v. Virginia Surface Mining & Reclamation Ass'n, Inc.*, 452 U.S. 264, 297 n.70 (1981).

The property interest petitioner asserts in these proceedings bears all the indicia traditionally recognized as incident to property. It is tangible, can be possessed, can be controlled, has intrinsic economic value, and is capable of being transferred. *Cf. Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1003 (1984); *United States v. General Motors Corp.*, 323 U.S. 373, 378 (1945). This interest is far from the sort of partial, speculative, or contingent claim this Court has refused to recognize as "property" for Fifth Amendment purposes. *E.g., Dames & Moore v. Regan*, 453 U.S. 654 (1981); *Duke Power Co. v. Carolina Environmental Study Group*, 438 U.S. 59 (1978).

Petitioner's property interest is, furthermore, based on reasonable expectations firmly grounded in the law of California, and in the common law tradition generally. California, like every other State, recognizes the right of every adult "to determine what shall be done with his own body." *Cobbs v. Grant*, 8 Cal.3d 229 (1972) (quoting *Schloendorff v. Society of New York Hospital*, 211 N.Y.

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[19] The informed consent cause of action protects petitioner's dignitary and privacy interest in controlling medical intrusions into his body.

The court's conclusion that petitioner retained no property interest in bodily materials extracted from him without his informed consent also precludes petitioner from resorting to California's inverse condemnation or eminent domain proceedings, as the court made clear. 51 Cal. 3d at 147 n.49; Pet. App. 36a.

1225, 105 N.E.92 (1914) (Cardozo, J.). California explicitly recognizes that its citizens retain a property interest in their own physical likenesses. *Lugosi v. Universal Pictures*, 25 Cal.3d 813 (1979). California statutes specifically grant to organ donors the power to control the disposition of organs removed from their bodies. *See* note 14 *supra*. Indeed, California law has long defined "property" as "every species of right and interest capable of being enjoyed as such upon which it is practicable to place a money value." *Yuba River Power Co. v. Nevada Irr. Dist.*, 207 Cal. 521, 523 (1929). Accordingly, petitioner's expectation that he could control the use of his bodily materials, and reap a reasonable return for their commercial use, was entirely reasonable.

Guidance from this Court is urgently needed as to whether the Just Compensation Clause protects the interest of citizens in the economic value of their bodily materials. Prevailing uncertainty over the extent of States' obligations to compensate individuals for property interests in bodily materials taken for scientific and commercial use is of vital concern to an industry that will generate tens of billions of dollars of profit by the end of the decade.[29] The Office of Technology Assessment of the Congress of the United States has concluded, after extensive study, that "[u]ncertainty about how courts will resolve disputes between specimen sources and specimen users could be detrimental to both academic researchers and the infant biotechnology industry," and that this uncertainty is so threatening to progress that "regardless of the merit of claims by the different interested parties, resolving the current uncertainty may be more important to the future

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[29] *See* Thompson, Genetic Breakthroughs, 1 Editorial Res. Rep. 4 (1986); Tompkins, Capitalizing in Life, Sci. Dig., June 1986, at 33; Dolnick, Spare Parts, 195 The New Republic 16 (1986); Medicine and Profits, U.S. News and World Report, Aug. 17, 1981; at 54; N.Y. Times, Mar. 9, 1987, § 1 at 1, Col. 6.

of biotechnology than resolving it in any particular way." [21]

This Court should also grant plenary review to clarify the limits on state court power to refashion state positive property law in order to deny compensation that would otherwise be constitutionally required. On the one hand, prior decisions suggest that "[p]roperty interests . . . are not created by the Constitution" but by "existing rules or understandings that stem from an independent source such as state law." *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 161 (1980) (quoting *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972)). On the other hand, this Court has repeatedly held that "a sovereign, 'by *ipse dixit*, may not transform private property into public property without compensation.'" *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1012 (1984) (*quoting Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 164 (1980)). In evaluating a state court holding that a party possesses no property interest for Just Compensation Clause purposes, "it is the province of this Court to inquire whether the decision of the state courts rests on a fair or substantial basis." *Demorest v. City Bank Farmers Trust Co.*, 321 U.S. 36, 42 (1944).

As in *Webb's Fabulous Pharmacies*, the state court's rejection of petitioner's claimed right to compensation in this case was little more than *ipse dixit*: the court deprived petitioner of the right to control the use to which his bodily materials would be put—an essential element of the "bundle of rights" constituting property—at a time when petitioner retained an undisputed property interest in the materials under California law because they were still part of his body. That result is—as the dissenting state Justices demonstrated—so at odds with existing expectations generated by California law that it can stand only if

[21] U.S. Congress, Office of Technology Assessment, New Developments in Biotechnology: Ownership of Human Tissues and Cells 27 (1987).

state courts possess absolute authority to determine the dimensions of property interests cognizable under the Fifth Amendment. This Court's decision in *Webb's Fabulous Pharmacies* suggests that the state court cannot constitutionally possess such authority.[22]

Resolution of this issue is a matter of pressing importance not only for this case, but also for takings jurisprudence generally. The breakneck progress of research in the field of biotechnology is creating, and will continue to create, new claims of property interests in biological materials. As a result of that technological progress, biological materials that even twenty years ago would never have been thought to have economic worth have—as the facts of this case amply show—become extremely valuable. Without direction from this Court as to the proper limits on state authority to extinguish interests in property that are otherwise based on reasonable expectations grounded in state law and tradition, citizens will be vulnerable to exploitation at the hands of the state. Furthermore, a significant risk exists that the law will develop in a patchwork fashion, creating geographical barriers that will be highly detrimental to the progress of biotechnology, and to interstate commerce generally, as

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[22] Leading constitutional commentators have recognized the need for clarification in this area:

> [G]overnment must be denied the power to give binding force to so sweeping an announcement, whether explicit or implicit, if we are to give content to the just compensation clause as a real constraint on federal power and, through the fourteenth amendment, on state and local power. But this shows that the expectations protected by the clause must have their source outside positive law. Grounded in custom or necessity, these expectations achieve protected status not because the state has deigned to accord them protection, but because constitutional norms entitled them to protection.

L. Tribe, American Constitutional Law 608 (2d ed. 1988); *see also*, Thompson, Judicial Takings, 76 Va. L. Rev. 1449, 1523-44 (1990).

individual States reach conflicting judgments whether bodily materials constitute property.

CONCLUSION

For all the foregoing reasons, the petition for certiorari should be granted.

Respectfully submitted,

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